Motion Ex. 31

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BP AMOCO CHEMICAL COMPANY, Plaintiff/Counter–Defendant, v. FLINT HILLS RESOURCES LLC, Defendant/Counter–Plaintiff.	Consolidated Case No. 05 C 5661 Judge Amy J. St. Eve
FLINT HILLS RESOURCES LLC, Third-Party Plaintiff, v. BP CORPORATION NORTH AMERICA INC., Third-Party Defendant.	

BP AMOCO'S RESPONSE TO FHR'S MOTION *IN LIMINE* NO. 5

RESPONSE OF BP AMOCO CHEMICAL COMPANY AND BP CORPORATION NORTH AMERICA INC. TO FHR'S MOTION TO BAR EVIDENCE OF PRE-SALE PRICE NEGOTIATIONS

Flint Hills Resources, LLC ("FHR") moves to bar the admission of evidence relating to pre-sale negotiations and pre-sale internal communications relating to those negotiations, contending that such evidence either is irrelevant or its probative value is substantially outweighed by the undue prejudice its admission would cause. FHR's motion should be denied for several reasons.

First, FHR's motion is an untimely *Daubert* challenge. BP Amoco's principal damages expert, Craig Elson, relied on and referenced the very same evidence as a basis for certain of his opinions in this case. FHR failed to move to exclude those opinions on *Daubert* grounds. This motion *in limine*, therefore, should be denied as an untimely *Daubert* challenge.

Second, this evidence is relevant and material to the jury's understanding of the importance of due diligence, its role in the transaction, and its effect on the ultimate price of the deal. Thus, in ruling on FHR's *Daubert* challenges to BP Amoco's due diligence expert (James Peters), the Court ruled that evidence about the due diligence process — which would include any effect that process had on the negotiations over the sale price — is appropriate for the jury to consider in construing certain disputed terms with respect to the condition-of-asset warranty, as well as in assessing FHR's fraud claim, the reasonableness of FHR's reliance, and the relative degree and amount of due diligence FHR performed relating to production capacity matters as compared to condition-of-asset and environmental matters.

Third, this evidence is relevant to BP Amoco's betterment defenses. As the Court has noted, FHR is entitled to be returned to the position in which it would have found itself absent the alleged breach — but not to a better position. Thus, the jury can consider evidence that FHR may have received a reduction in the purchase price for certain condition-of-asset issues for which it now seeks further compensation in the form of repair costs or loss of value, which may ultimately result in FHR improperly being placed in a better position than that in which it would have been absent the alleged breach.

Fourth, although FHR disputes that the $19 million price reduction at issue was attributable to its due diligence findings or to the assets at issue its claims, that is not a basis for excluding the evidence. Instead, this is a disputed issue for the jury to resolve.

Fifth, FHR's undue prejudice argument lacks any support, explanation, or authority and should be denied on these grounds alone. Moreover, the evidence FHR seeks to exclude is in fact not unfairly prejudicial, confusing, or misleading.

RELEVANT BACKGROUND

A. The Parties Agreed To A $19 Million Reduction In The Purchase Price In The Fall Of 2003.

There is no dispute that BP Amoco and FHR agreed to a reduction of $19 million in the purchase price for the PCBU in late October and early November 2003. (*See* Ex. 1, Sementelli Dep. at 206:1 - 209:25; Ex. 2, DX-2240; Ex. 3, Mahoney Dep. at 225:11 - 229:18; Ex. 4, DX-2206; Ex. 5, Elson Dep. at 12:15-19; Ex. 6, DX-2774 at App. W; Ex. 7, Jackson Dep. at 267:19 - 283:13; Group Ex. 8, DX-2183, -2184, -2185.) There is also no dispute that FHR asked BP Amoco for this price reduction. (*See id.*)

B. The Reasons For The $19 Million Purchase Price Reduction Are Disputed.

While the fact that a purchase price reduction of $19 million was sought by FHR and agreed to by BP Amoco in the Fall of 2003 is not disputed, FHR apparently now disputes that this purchase price reduction had anything to do with its due diligence findings relating to the assets at issue in its claims. Instead, FHR contends that the reduction was solely attributable to the declining financial performance of the business or other issues having nothing to do with its due diligence findings relating to the condition of certain assets. (*See* Dkt. # 588 at 3.) There is, however, documentary and testimonial evidence to the contrary, which evidence suggest that the price reduction was attributable to FHR's due diligence findings relating to the condition of certain assets, at least in part. (*See, e.g.*, Ex. 9, Wrenn Dep. at 228:7 - 241:10, 243:15 - 246:9, 259:14 - 263:18; Group Ex. 10, DX-1864, -899. -1866.)

C. Two Of BP Amoco's Experts, Craig Elson And James Peters, Have Relied On Evidence Relating To The $19 Million Price Reduction With Respect To Certain Of Their Opinions In This Case.

Craig Elson is BP Amoco's damages expert. In his October 2008 report, Elson summarized at some length the evidence relating to the $19 million price reduction. (Ex. 6, DX-2774 at App. W.) Elson also cited and discussed this evidence in connection with certain of his betterment opinions and other critiques of FHR's damages claims. (*See, e.g.*, Ex. 11, DX-2773 at 3, 7 & n.19, 16 & n.41, 17 & n.46; *id.* at Ex. 5; Ex. 6, DX-2774 at App. D at 2 & n.8; *id.* at App. F at 2 & nn.3-4; *id.* at App. K at 2 & n.2; *id.* at App. S at 2-3.)

Similarly, BP Amoco expert James Peters referred to evidence of this $19 million purchase price reduction as additional support for certain of his due diligence opinions. (*See, e.g.*, Ex. 12, Peters Dep. at 4:17 - 5:5, 323:23 - 333:1; Ex. 13, DX-1302; Ex. 14, DX-2657 at 29-32, 36-37.)

D. The Court Has Ruled That Evidence Relating To FHR's Due Diligence, Which Includes The Disputed Impact Of The Due Diligence On The Purchase Price, Is Relevant.

In its *Daubert* motion, FHR did not challenge Elson's reliance on evidence relating to the $19 million price reduction it now seeks to preclude. (*See* Dkt. # 406 & 408.) And while the Court granted a portion of FHR's motion, it did not exclude any opinions that are related to the $19 million price reduction. (Dkt. # 507.) Similarly, while FHR challenged certain of Peters' opinions, it did not challenge his reliance on evidence relating to the $19 million price reduction. (*See* Dkt. # 409 & 411.)

In its opinion on the *Daubert* motion challenging Peters' testimony, the Court held that Peters' due diligence opinions are relevant and reliable:

> Mr. Peters' testimony regarding the due diligence process is also relevant. … Evidence pertaining to Flint Hills' due diligence, or lack thereof, prior to the sale of the Joliet Plant is relevant to elements of [FHR's] fraud claims -- specifically, materiality[,] … BP's knowledge of the falsity of the warranties[,] … and Flint Hills' justifiable reliance on the representations…. Whether Flint Hills believed the representations were true at the time of sale or knew that they were untrue as to any particular asset is not relevant, ***but evidence of the extent and substance of Flint Hills' due diligence may be relevant to other material issues in the case.*** BP reasonably contends, for example, that Flint Hills' due diligence, or lack thereof, may be relevant extrinsic evidence to inform the trier of fact's determination of the parties' intended meaning of ambiguous contract terms. … Due diligence evidence, including what documents and physical defects Flint Hills would have seen, what questions it asked, and the like, may also bear on what the parties likely intended certain contract terms, such as 'wear and tear,' to mean. Furthermore, Flint Hills has repeatedly asserted that BP restricted Flint Hills' pre-sale due diligence of the Joliet Plant.

(Dkt. # 511 at 4 (emphasis added).) Thus, this Court did ***not*** hold that evidence of pre-sale price negotiations relating to the due diligence process was irrelevant and inadmissible for all purposes, as FHR's motion (Dkt. # 588 at 3) incorrectly asserts.

ARGUMENT

FHR, as the moving party on this motion, bears the burden of identifying the particular evidence at issue, demonstrating its irrelevance, and demonstrating that any alleged unfair prejudice substantially outweighs the probative value of such evidence. *See Mason v. City of Chicago*, 2009 WL 1891797, at *2 (N.D. Ill. July 1, 2009); *cf. People v. Hood*, 244 Ill. App. 3d 728, 733, 614 N.E.2d 335, 339 (Ill. App. Ct. 1993) ("burden is on the party seeking to bar the evidence to show why it is inadmissible and prejudicial"); *Sanchez v. City of Chicago*, 2007 WL 2358632, at *1 (N.D. Ill. Aug. 17, 2007) (noting that where doubt exists as to admissibility of disputed evidence, evidentiary ruling should be against the party moving to exclude *in limine*).

FHR cannot satisfy this burden by means of unsupported or unexplained assertions of irrelevance and/or prejudice. *See, e.g., Hardrick v. City of Bolingbrook*, 522 F.3d 758, 762 (7th Cir. 2008) (an unsupported, conclusory argument is waived); *U.S. v. Berkowitz*,

927 F.2d 1376, 1384 (7th Cir. 1991) ("We repeatedly have made clear that perfunctory and undeveloped arguments, and arguments that are not supported by pertinent authority, are waived"); *Capuano v. Consol. Graphics, Inc.*, 2007 WL 2688421, at *4 (N.D. Ill. Sept. 7, 2007) (denying multiple motions *in limine* based on mere "conclusory assertions" that were unsupported by facts or legal authority, and therefore "insufficient to warrant exclusion of evidence"); *McClain v. Anchor Packing Co.*, 1996 WL 164385, at *7 (N.D. Ill. Apr. 3, 1996) (similar).

While FHR asserts that "[a] motion *in limine* to exclude evidence should be granted if the evidence sought to be excluded is inadmissible for any purpose" (Dkt. # 588 at 2), this Court has ruled differently, stating the "court should exclude evidence *in limine* 'only when it is clearly inadmissible on all potential grounds.'" (Dkt. # 544 at 2 (quoting *Wafra Leasing Corp. 1999-A-1 v. Prime Capital Corp.*, 339 F. Supp. 2d 1051, 1054 (N.D. Ill. 2004) (citing *Hawthorne Partners v. AT&T Tech., Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993)).) *See also Euroholdings Capital & Inv. v. Harris Trust & Sav. Bank*, 602 F. Supp. 2d 928, 934 (N.D. Ill. 2009) (evidence excluded *in limine* "is inadmissible on all potential grounds"); *Townsend v. Benya*, 287 F. Supp. 2d 868, 872 (N.D. Ill. 2003) (similar).[1]

I. FHR'S MOTION IS AN UNTIMELY, AND THEREFORE IMPROPER, *DAUBERT* CHALLENGE TO THE OPINIONS OF ELSON AND PETERS.

The Court's scheduling order required *Daubert* motions to be filed by April 10, 2009. (Dkt. # 279) Indeed, the Court has now decided all of the parties' *Daubert* motions, subject to a few hearings that took place earlier this week. Yet FHR's instant motion is a barely disguised *Daubert* motion that seeks to preclude facts that BP Amoco's principal damages expert, Craig Elson, and its due diligence expert, James Peters, cited for additional support in forming certain of their opinions. Thus, FHR's motion should be denied as an untimely *Daubert* motion filed long after the Court-ordered deadline. *See, e.g., Shreve v. Am. Commercial Barge Line, LLC*, 2005 WL 6010527, at *1 (S.D. Ill. Apr. 21, 2005) (denying a party's motion in limine to preclude/limit expert testimony because the time for *Daubert* motions had passed) (citing district

[1] While FHR cites to *Plair v. E.J. Brach & Sons, Inc.*, 864 F. Supp. 67 (N.D. Ill. 1994) as support for its assertion that inadmissibility for a single purpose is sufficient to grant a motion *in limine*, in fact *Plair* states the same rule as stated by this Court and in the other cases cited by BP Amoco. *See Plair*, 864 F. Supp. at 69 ("A motion in limine to exclude evidence may be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose.") (citing for support *Hawthorne Partners*, 831 F. Supp. at 1400).

court rules on motion practice which instruct litigants that "[a]ll *Daubert* motions (seeking to exclude expert testimony/evidence) must be filed by the dispositive motion deadline not the motion in limine deadline."); *IMR USA Inc. v. GES Exposition Serv's, Inc.*, 2006 WL 5112760, at *1 (N.D. Ill. Jan. 6, 2006) (denying motion in limine to preclude expert testimony after the *Daubert* motions and hearings had concluded); *cf. Landmark Am. Ins. Co. v. Green Lantern Roadhouse, LLC,* 2009 WL 458561, at *2 (S.D. Ill. Feb. 24, 2009) (denying a motion in limine to challenge expert testimony because it was in the nature of a *Daubert* challenge).

II. THE COURT HAS RULED THAT THE EVIDENCE AT ISSUE IS RELEVANT TO FHR'S BREACH -OF-CONTRACT ALLEGATIONS.

In ruling on FHR's *Daubert* challenge to Mr. Peters' opinions and testimony, the Court held that due diligence evidence (which includes pre-sale price negotiations affected by due diligence) is relevant evidence that the jury may consider. (Dkt. # 511 at 4.) FHR has not moved for reconsideration of the trial court's ruling, nor does it have grounds to do so at this juncture. That prior ruling is law of the case, and FHR is bound by it. *See Tice v. Am. Airlines, Inc.*, 373 F.3d 851, 853 (7th Cir. 2004) (under "the doctrine of the law of the case, … a ruling made in an earlier phase of a litigation controls the later phases unless a good reason is shown to depart from it"); *E.E.O.C. v. Midwest Emergency Assoc., Ltd.*, 2008 WL 239143, at *4-5 (N.D. Ill. Jan. 29, 2008) ("The Court will only reexamine the earlier decision if that decision is clearly erroneous, there is a change in the law, or if the decision constitutes a manifest injustice."); *see also Web Comm. Group, Inc. v. Gateway 2000, Inc.*, 1995 WL 23535, at *1-2 (N.D. Ill. Jan. 17, 1995).

Although FHR has recently withdrawn its condition-of-asset fraud claims (*see* Dkt. # 588 at 3 n.3), that does not render the disputed evidence irrelevant: the Court ruled that such due diligence evidence is relevant to the parties' understanding of the "wear and tear" terms that are part of the condition-of-asset warranty in the PSA, and this evidence also is relevant to rebut to FHR's repeated assertions and allegations that BP Amoco restricted FHR's due diligence. (Dkt. # 14., Countercl. at ¶ 47; Ex. 15, 4/18/08 Robertson Dep. at 115:6-13, 163:15-21, 164:22-25, 176:4-18; Dkt. # 267 at ¶¶ 94-95, 99-102.)

III. EVIDENCE REGARDING THE $19 MILLION PRICE REDUCTION ALSO IS RELEVANT TO FHR'S DAMAGES CLAIMS AND BP AMOCO'S BETTERMENT DEFENSES.

Evidence that FHR received a $19 million reduction in the purchase price for certain condition-of-asset issues is relevant to the issue of whether and to what extent FHR's recovery of

its claimed repair-cost damages would result in an impermissible betterment. As the Court held in ruling on BP Amoco's summary judgment motion addressed to damages, "Illinois law is an overlay on the PSA's exclusive remedy scheme," and "[c]ontract damages should neither place the injured party in a better position nor result in a windfall recovery." (Dkt. # 437 at 18 (citing *Platinum Tech., Inc. v. Fed. Ins. Co.*, 282 F.3d 927, 932 (7th Cir. 2002).) Evidence of a reduction in the purchase price, considered in connection with the amounts that FHR now seeks as damages for the some of the same issues, is relevant to the jury's determination of whether FHR will receive an impermissible windfall if it recovers the full amounts it is now demanding. *See Kokomo Opalescent Glass Co. v. Arthur W. Schmid Int'l Inc.*, 371 F.2d 208, 214-15 (7th Cir. 1966) (noting relevance of post-transaction evidence including financial performance and sales data in determining damages under a breach-of-contract action where lost profits were not sought; in fact, testimony regarding lost profits was admitted as partial evidence in the overall damages calculation as well); *Hawthorne Partners*, 831 F. Supp. at 1402-03 (denying a motion to exclude post-transaction evidence of sales and refinancing attempts, and noting the probativeness of post-sale events to determine diminished property value in an action where lost profits are not sought); 3 Dan B. Dobbs, *Dobbs Law of Remedies: Damages-Equity-Restitution* (2d Ed. 1993) at 36 § 12.2(2) ("On the other hand, if the property is used solely for income production and the breach does not affect the property's value or the income it produces, recovery of large sums to provide substitute performance is likely to be windfall or waste.") (footnote omitted).

Such evidence also has relevance in determining what measure of damages (if any) to apply in this case. The Court has ruled that the indemnity provision of the PSA incorporates common-law limitations on the recovery of repair costs, one of which proscribes the recovery of repair-cost damages where they are "'unreasonably disproportionate to the benefit to the purchaser'" or "'grossly disproportionate to the results obtained.'" (Dkt. # 437 at 10.) That prior ruling is law of the case, and FHR is bound by it. *See* cases cited *supra*. Thus, the jury here may consider evidence of the $19 million purchase price reduction as evidence of the true value to FHR of many of the condition-of-asset claims it now asserts in determining, *inter alia*, whether a repair-cost measure of damages is appropriate here.

IV. FHR'S FACTUAL DISPUTES AS TO THE BASIS FOR THE PRICE REDUCTION, AND ITS PAROL EVIDENCE ARGUMENTS, DO NOT ENTITLE FHR TO EXCLUDE THIS EVIDENCE.

FHR's arguments for exclusion also fail because they are an improper attempt to have disputed factual issues regarding the basis for the $19 million purchase price reduction resolved in its favor by the Court, as a matter of law, by means of this motion. A motion *in limine* is not an appropriate vehicle for resolving such factual disputes. *See, e.g., Ty Inc. v. Softbelly's Inc.*, 2006 WL 5111124, at *11 (N.D. Ill. Apr. 7, 2006) (noting that a motion *in limine* seeking to resolve a factual dispute is "inappropriate" and "for the jury to decide"); *Nilssen v. Motorola, Inc.*, 1998 WL 513090, at *2-3 (N.D. Ill. Aug. 14, 1998) (denying motions *in limine* in part due to their attempt to resolve factual disputes).

Moreover, FHR's parol evidence rule arguments are misplaced. BP Amoco does not intend to offer evidence regarding the$19 million price reduction to interpret any unambiguous provisions of the PSA. To the contrary, BP Amoco intends to introduce such evidence in opposing and attacking the basis for FHR's inflated and unsupported damages proof. Use of extrinsic evidence for such purposes does not run afoul of the parole evidence rule. *See, e.g., Web Comm. Grp., Inc. v. Gateway 2000, Inc.*, 169 F.R.D. 108, 111 (N.D. Ill. 1995) (on motion *in limine* to exclude alleged extrinsic evidence in breach of contract case, court found evidence to be admissible, relevant, and probative on issue of damages); *Bublitz v. Wilkins Buick, Mazda, Suzuki, Inc.*, 377 Ill. App. 3d 781, 787, 881 N.E.2d 375, 381 (Ill. App. Ct. 2007) (extrinsic evidence offered for the purposes of determining actual value and damages does not run afoul of the parol evidence rule); *see also Dancy v. William J. Howard, Inc.*, 297 F.2d 686, 688 (7th Cir. 1961) ("[P]arol or extrinsic evidence is admissible to explain the purpose of the execution of a written instrument, what the parties intended, the consideration for its execution and the circumstances surrounding its execution") (quotations omitted); *In re Apex Automotive Warehouse, L.P.*, 238 B.R. 758, 769 (Bkrtcy. N.D. Ill. 1999) (similar).

V. FHR'S RULE 403 ARGUMENTS ARE UNSUPPORTED, UNEXPLAINED, AND WITHOUT MERIT.

Finally, FHR's arguments that evidence regarding the pre-sale price negotiations should be excluded pursuant to Rule 403 is conclusory, unsupported by citation to record or legal authority, and otherwise unexplained. (*See* Dkt. # 588 at 4.) Such conclusory arguments are insufficient and constitute a waiver of any Rule 403 argument. *See Capuano*, 2007 WL 2688421, at *4; *McClain*, 1996 WL 164385, at *7; *Wolfe v. Howmedica, Inc.*,

1996 WL 10901, at *2 (N.D. Ill. Jan. 10, 1996) (denying motion *in limine* "based on unsupported representations."); *Hardrick*, 522 F.3d at 762; *Berkowitz*, 927 F.2d at 1384.

Moreover, there is nothing unfairly prejudicial, confusing, or misleading about the evidence in question. BP Amoco does not offer the evidence to vary an unambiguous term in the PSA or for any other improper purpose. There is nothing confusing about the evidence. And there is no reason to suspect that the jury will be misled by hearing this evidence. Finally, FHR's failure even to articulate any grounds for concluding otherwise now forecloses it from offering such explanations in its reply brief. *See, e.g., Kelso v. Bayer Corp.*, 398 F.3d 640, 643 (7th Cir. 2005).

CONCLUSION

For all of the foregoing reasons, FHR's motion *in limine* number 5 should be denied.

Dated: July 10, 2009

Respectfully submitted,

By: /s/ Drew G. A. Peel

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CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2009, I caused a true and correct copy of the foregoing to be served electronically via the CM/ECF system on the following:

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